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BEFORE THE
POSTAL REGULATORY COMMISSION

Periodic Reporting (Proposal Thirteen)	: : :	**Docket No. RM2015-7**

UNITED PARCEL SERVICE, INC.'S RESPONSE TO MOTION OF AMAZON FULFILLMENT SERVICES, INC. TO STRIKE PORTIONS OF UPS'S REPLY COMMENTS

(August 3, 2015)

United Parcel Service, Inc. ("UPS") respectfully submits this response to Amazon Fulfilment Services, Inc.'s Motion to Strike Portions of UPS's Reply Comments, dated July 29, 2015 ("Motion to Strike"). Amazon has joined the Postal Service in asking the Commission to disregard the improvements Dr. Kevin Neels made to one aspect of his National Form 3999 Model, as described by UPS and Dr. Neels in submissions dated July 22, 2015. Specifically, Dr. Neels made three technical modifications in response to the Postal Service's and Amazon's filings regarding how to impute certain explanatory variables to fill gaps in the Postal Service's data.

Dr. Neels has always acknowledged that his temporary need to impute these variables, because of the existing gaps in Postal Service data, raises complex econometric issues. He considered the criticisms lodged by the experts from the Postal Service and Amazon and made three adjustments to his imputation approach. He detailed these adjustments and why they were made, explained how the adjustments yielded improved results, and provided supporting workpapers. Dr. Neels' willingness to

consider and address the criticisms of his colleagues in order to generate more accurate and reliable results is a constructive approach – not one that should be rejected out of hand.

Yet both the Postal Service and Amazon object to Dr. Neels making any technical adjustments to his modeling at all, even when those adjustments respond to suggested changes by their own experts. Amazon does not argue against the merits of Dr. Neels' changes or claim that they do not improve the results. Instead, Amazon objects to the very idea that Dr. Neels would make any adjustments whatsoever. It even argues that the Commission would violate the Due Process Clause and the notice requirements of the Administrative Procedure Act if it considers the changes that Dr. Neels made. As discussed below, these assertions lack merit.

In fact, Dr. Neels' willingness to make technical adjustments to his model is fully consistent with the flexible and collaborative nature of this proceeding. It is also consistent with Amazon's stated goal, which UPS shares, of getting to the right outcome in this "important, complex, controversial and fact-intensive" docket. Motion to Strike at 6. Accordingly, Amazon's request for the "extraordinary relief" of a motion to strike, 39 C.F.R. § 3001.21(c), should be denied.

I. DR. NEELS' TECHNICAL CHANGES ARE CONSISTENT WITH THE FLEXIBLE AND COLLABORATIVE NATURE OF THIS PROCEEDING.

As an initial matter, Amazon overstates the nature of the changes Dr. Neels made in connection with his July 22 report. Amazon asserts that, on July 22, Dr. Neels offered "a new and substantially different model" from the National Form 3999 Model he had previously described on June 8, 2015. In fact, the fundamentals of Dr. Neels' National Form 3999 Model have not changed. The model continues to use national

Form 3999 data for over 140,000 city carrier routes, and it continues to use a holistic and flexible approach to investigating city carrier costs, which lets the data speak for itself without relying on the type of unsupported assumptions underlying Proposal Thirteen. It is these fundamental strengths that should guide the Commission's decision here.

The only changes Dr. Neels made in UPS's July 22 filing were technical changes regarding how to impute certain explanatory variables to fill gaps in the Postal Service's data. Amazon's own description of these changes confirms that they are limited and technical in nature. *See* Motion to Strike at 3 (describing the change from a negative binomial regression to a simple linear regression, the addition of intertemporal volume change indexes, and a combined parcel variable in the second-stage regression). Amazon's description also confirms that these changes involve only the imputations, which are not a core feature of the model. Quite the opposite: the only reason the National Form 3999 Model must impute any variables at all today is because the Postal Service has failed to collect accurate parcel data. As UPS has emphasized, this need for reliance on imputations could be rapidly eliminated if the Postal Service were to improve the quality of the information it collects on this increasingly important segment of its business.

Amazon relies upon a 35-year old Commission order to argue that Dr. Neels' refinement of his model was improper at the reply comment stage. *See id.* at 4 (citing Dkt. No. R80-1, Order No. 362 (Nov. 24, 1980) ("Order 362")). But this fails to acknowledge that Commission proceedings from that time were more adversarial and less flexible than they are today. As the Commission has explained:

> [O]ne of the important benefits of the PAEA is the freedom that it gives the postal community to decide analytical issues in a nonadversarial context. Under the PRA, analytical issues were decided employing a litigation model. Under that model, the Commission was required to resolve an analytical issue by accepting or rejecting competing analyses submitted by opposing witnesses . . . .

Dkt. No. RM2008-4, Order No. 104 at 30 (Aug. 22, 2008). Today, in contrast, the procedures for dockets involving changes to analytical principles, like this one, are (i) "highly flexible," *id.* at 31, and (ii) more collaborative. Under PAEA, the Commission takes advantage of the flexibility it has by "approaching analytical issues through a process that promotes cooperation and facilitates consensus." *Id.*

The Commission has followed these principles in this docket. It has promoted an active exchange of positions and criticisms among the parties and their experts. It has been appropriately flexible with its schedule, while avoiding prejudice to any party. It has not denied any interested party — including Amazon — the right to make any points it wishes to make.[1]

Dr. Neels' consideration of the comments of his professional colleagues on these complex issues is also consistent with these principles of cooperation and consensus. At each stage, Dr. Neels has engaged respectfully and thoughtfully with the points made by his colleagues. Granting Amazon's Motion to Strike, in contrast, would dissuade experts from being responsive to constructive points made by another.

[1] Amazon asserts that, by including Dr. Neels' refinements in its July 22 reply comments, UPS "exceeded the scope of Commission Order Nos. 2455 and 2571." Motion at 2. But those Orders did not prevent UPS from refining its economic model in reply comments. Indeed, Order 2571 granted UPS a brief extension to its reply comments in order to "promote development of a more complete record." Order 2571 at 3-4.

In fact, Amazon's Motion to Strike would fail even under the prior, more-adversarial regime. In the 1980 Rate Commission order on which Amazon relies, the Commission struck "additional studies" proffered in a Postal Service witness' rebuttal testimony, because the studies should have been offered in the Postal Service's direct case. Order 362 at 3. But the Commission *declined* to strike other portions of the witness's challenged rebuttal testimony, where those other portions responded to criticisms by other parties. *See id.* at 4-5 ("we are prepared to accept those portions as truly intended to answer a point brought up for the first time in the case filed by UPS as an intervenor"); *id.* at 5 ("Additionally, we believe that the portions of Mr. Stralberg's testimony that address the arguments raised by [other parties] are true rebuttal.")

Dr. Neels' refinements to his model in this docket constitute "true rebuttal" that was "intended to answer" criticisms to his model lodged by the Postal Service and Amazon. Thus, it would have been proper for Dr. Neels to submit these refinements in the context of UPS's reply comments even under the more adversarial approach that existed before PAEA.

Amazon's appeal to judicial practice in adversarial litigation fares no better. Amazon asserts that courts are opposed to one party "sandbagging" another. Motion to Strike at 4 n.3. But no one can seriously accuse Dr. Neels of "sandbagging" Amazon or the Postal Service by responding to the criticisms of their experts on these technical points.

In fact, courts fully anticipate that experts will continue to refine their work during the course of a litigation. *See generally* 10A Fed. Proc., L. Ed. § 26:890 ("Experts may wish to modify or refine their disclosed opinions in the light of further studies, opinions

expressed by other experts, or other developments in the litigation."). This is especially true when the work is complex and technical, as it is here. *See, e.g., Nnadili v. Chevron U.S.A., Inc.*, No. CIV.A. 02-1620 ESH/A, 2005 WL 6271043, at *1 (D.D.C. Aug. 11, 2005) ("[I]n complex litigation involving the use of expert witnesses, an expert will likely refine and even change his or her opinion as he or she prepares for trial."). It would be contrary to the public interest in effective rulemaking to prevent an expert from improving complex econometric models in light of criticisms raised by other experts.

II. AMAZON'S RIGHTS HAVE NOT BEEN VIOLATED.

Amazon cannot claim that it lacks notice of the limited changes Dr. Neels made. Amazon reviewed Dr. Neels' report and accessed his supporting workpapers, and its own brief confirms that it understands the limited nature of the technical changes that were made. *See* Motion to Strike at 3 (describing the changes and their results).

Instead, Amazon claims that it would violate due process and the APA if the Commission were to consider the changes, because Amazon was not given a chance to respond to them. This argument fails, however, because in this proceeding, the Commission has not done anything to deny Amazon the right to make substantive comments regarding the changes. In fact, Amazon *has* responded to Dr. Neels' changes. It simply chose to seek the "extraordinary relief" of a motion to strike, instead of seeking to respond on the merits. *See* 39 C.F.R. § 3001.21(c).

The D.C. Circuit case of *EchoStar Satellite L.L.C. v. FCC*, 457 F.3d 31 (D.C. Cir. 2006) is instructive. In *EchoStar*, the petitioner alleged that the agency erred by considering another party's study when the other party refined and provided further documentation for the study in its reply comments. 457 F.3d at 39. The D.C. Circuit rejected petitioner's claim of procedural error, noting that "EchoStar could have

criticized the study, or requested more time in which to do so, during the two months between the filing of the Associations' reply comments and the issuance of the Commission's decision." *Id.* The same logic applies here: Amazon cannot complain about consideration of Dr. Neels' technical changes when Amazon was not denied the opportunity to respond to them.

Amazon's cited authorities (Motion at 5-6) are consistent with these principles. The common thread in these cases is that the aggrieved parties suffered unfair surprise from agency action when the agency made a final decision without providing adequate notice or the opportunity to comment. In *Allina Health Serv's. v. Sebelius*, 746 F.3d 1102 (D.C. Cir. 2014), an agency adopted one interpretation of a statute in a proposed rule and then adopted an opposite interpretation of the statute in its final rule. *Id.* at 1106. In *CSX Transp., Inc. v. Surface Transp. Bd.*, 584 F.3d 1076 (D.C. Cir. 2009), the agency's "proposed rulemaking had failed to give notice of a significant change that surfaced only in the final rule." *Id.* at 1078. In *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227 (D.C. Cir. 2008), the agency based its rulemaking on internal studies that were never made publicly available in unredacted form. *Id.* at 236-38. And in *City of Idaho Falls v. FERC*, 629 F.3d 222 (D.C. Cir. 2011), the agency changed a rule without engaging in notice-and-comment rulemaking at all. *Id.* at 429. Here, Amazon cannot claim any such lack of notice or opportunity to comment.

Amazon's citations to prior Commission decisions (Motion at 6) are equally inapposite. As noted above, those decisions all come from pre-PAEA proceedings that were more adversarial and less flexible than this one. Even in that posture, they stand only for the proposition that testimony or evidence may be excluded when other

interested parties were given no opportunity to consider or respond to it. *See, e.g., Mail Order Ass'n of Am. v. U.S. Postal Serv.*, 2 F.3d 408, 429-30 (D.C. Cir. 1993) (reversing Rate Commission decision on cost attribution because "[t]he parties [] were afforded no opportunity during the hearing to test, or even examine, the methodology the Commission ultimately adopted or the figures and calculations used to attribute access costs").[2] Amazon cannot show that it was deprived of the ability to examine Dr. Neels' technical changes – in fact, it has been allowed to do so – or to respond to them.

The motions to strike indicate that the Postal Service and Amazon are asking the Commission to hold that the temporary complexities in one aspect of Dr. Neels' model overwhelm its considerable strengths, so the Commission will reject the National Form 3999 Model in favor of Proposal Thirteen — a proposal that is burdened with an outdated approach which is reliant upon numerous unsupported assumptions. For the reasons UPS has set forth in this docket, that would not be the right outcome. Amazon has certainly not shown it is entitled to the extraordinary remedy of a motion to strike.

III. CONCLUSION

UPS welcomes Amazon's participation in this proceeding. Indeed, as discussed above, UPS and Dr. Neels reviewed Amazon's critiques in good faith and adjusted Dr. Neels' economic model. But by moving to strike Dr. Neels' adjustments, Amazon has

[2] Amazon also cites a 2006 decision in which the Rate Commission held that a Postal Service study could not serve as substantive evidence in a cost proceeding because "there is insufficient time remaining in this proceeding to afford the intervenors the full panoply of procedural due process rights that the Postal Reorganization Act requires with respect to the street time cost analysis," including "conduct[ing] discovery, cross-examin[ing] the attesting witnesses, and prepar[ing] rebuttal evidence in the time remaining in this proceeding." Dkt. No. R2006-1, Order No. 1482 at 4 (Nov. 8, 2006). This proceeding has not involved any of these adversarial mechanisms.

taken a step that is inconsistent with the goals of this docket under PAEA. For the foregoing reasons, UPS respectfully requests that Amazon's Motion to Strike be denied.

Respectfully submitted,

UNITED PARCEL SERVICE, INC.,

By: /s/ Steig D. Olson

Steig D. Olson
Quinn Emanuel Urquhart & Sullivan, LLP
51 Madison Ave., 22nd Floor
New York, NY 10010
(212) 849-7152
steigolson@quinnemanuel.com

Attorney for UPS